ISSUES IN DEVELOPING THE PRACTICE OF ENVIRONMENTAL MEDIATION IN OHIO: A MINI-SYMPOSIUM

FORWORD

This mini-symposium on Issues in Developing the Practice of Environmental Mediation in Ohio is the result of a panel discussion which occurred at The Ohio Dispute Resolution Conference in April 1985. The object of this panel was to discuss the possibility of implementing environmental mediation in Ohio and the issues which arise in connection with this type of mediation.

Four individuals made presentations: Dr. Richard Collins, Director of the Institute for Environmental Negotiation; The Honorable Howard Bellman, Secretary for Labor, Industry, and Human Relations, State of Wisconsin; David O'Connor, Executive Director of the Office of Mediation Services, State of Massachusetts; and Prof. Keith Hawkins, Fellow of Wolfson College, Oxford University, United Kingdom.

The three reactors to these presentations were: Virginia Aveny, Deputy Director, Ohio Environmental Protection Agency; David Hartley, State Representative in the Ohio State Legislature; and Peter Procario, President of the Ohio Environmental Council.

(MODERATOR)

The Gund Foundation has made it possible for us to have this panel discussion because of its interest in establishing the practice of environmental dispute resolution in Ohio. The format for today is to discuss this issue, and if necessary, to continue the discussion beyond the time allotted for this panel. I intend to have a brief break for those of you who want to leave and go to another panel discussion but the rest of us can stay and continue the discussion.

I think we have a stellar panel to serve as our resource people and an equally stellar group to respond to what the resource people have suggested as ways to establish environmental mediation in Ohio. Essentially, the resource people are going to take about 10 minutes each to lay out their perspective on what are the considerations when trying to establish environmental dispute resolution in Ohio. I will then call on the people who work in Ohio to give their reactions to what has been said, and then the audience can raise any questions it has.

(DAVID O'CONNOR)

I want to thank the Kettering Foundation and the Gund Foundation for inviting me here today. The Massachusetts Mediation Service is a new state agency and I am its first Executive Director. As a result, I am not going to be so presumptuous as to think that I have advice to give Ohio about what it ought to do regarding a state agency. But I am beginning to find out what might help Massachusetts in this regard. I hope some of my thoughts will be of interest and perhaps be usefully challenged. Some discussion will reveal the many questions that remain for this type of undertaking.

First, let me discuss how I became an environmental mediator. My history parallels the development of the field. In 1976, I was working as a research assistant for a small, nonprofit firm in Boston and found myself, quite by accident, in the middle of a large dispute concerning the conversion of a major power plant from oil to coal. The issue was whether the power plant would have to install scrubbers. I knew very little about the technology, finances and environmental regulations concerning such a conversion, but sensed that a plan for conversion could not be agreed upon because the parties distrusted and did not understand one another. I invited them to meet and talk to one another at our offices, and they accepted.

At the same time, I began to learn about mediation. I completed an American Arbitration Association training program that involved the theory and practice of mediation.

The successful resolution of that first case spurred me to attempt to mediate other disputes. For a few years I mediated disputes as a solo practitioner in New England and then helped organize a nonprofit environmental mediation center. Over a period of five years, I was involved as a mediator in disputes over the construction and operation of hydro-electric facilities, widening of highways, establishment of air quality standards for industrial facilities, and rate setting, as well as other public problems related to such quality of life issues as rent control disputes and the expansion of large institutions—such as hospitals and schools—and their impact on neighborhoods.

It gradually became clear that the practice of environmental mediation occurred in a very haphazard fashion and because of the persistence of committed individuals. However, it lacked any kind of systematic or organized method of connecting disputing parties with mediators. Other groups and individuals, in particular

the National Institute for Dispute Resolution, were also concerned about this problem.

The National Institute wanted to test the theory that mediation offices in state governments might be in a position to help bring disputing parties together with mediators. The Institute offered modest grants to states that would set up such offices and selected four states to receive grants: Massachusetts, Wisconsin, Alaska, and New Jersey. Each of these states is at one stage or another of organizing a state office of mediation. New Jersey is probably the most advanced. Massachusetts is only starting.

Is there merit to the theory that a state office will help the practice of environmental mediation? My experience as a mediator suggests that it would. There is a great need to legitimize mediation and other forms of alternative dispute resolution in nonlabor areas. A mediator is in an awkward position to do this because parties are skeptical of mediators promoting their own services. An entity that endorses, explains, and promotes mediation would perform a substantial service for private mediators. It would also be helpful to disputing parties to have an entity providing them with more extensive and consistent information about mediation: what it is, where it has worked, where it has not worked.

The Massachusetts agency which will provide the services discussed above is located in the Executive Office for Administration and Finance. To the extent that it is possible to do so, this office provides a neutral location in government for the Mediation Service. Over the next couple of years we will have to see whether this is the best place in government for the agency to be located. The major question is whether the location maximizes the agency's credibility and acceptability to those whom it would serve.

I suppose there is some question whether hiring a former mediator to organize this agency is a wise decision. I have experience in mediation but I am a newcomer to government. Someone who has had experience inside state government would have an advantage. However, I think the major responsibility for the agency will be in identifying cases that have the most promise for mediation. Assessing whether an environmental or public policy dispute is right for mediation is a difficult and time-consuming business. Someone who has not evaluated cases for their mediation potential might find such work difficult.

Many disputes find their way through state agencies to the attorney general's office. I expect a portion of our work will be referrals from the attorney general's office. With respect to disputes that

involve private parties, I think the agency should help parties take advantage of the available pool of private mediators. The demand for this sort of service is not great at the moment, and therefore it would be illogical to staff a number of mediators. The private sector will do an adequate job of correlating supply with demand. The agency will assemble a roster of mediators that could be available to assist parties who have disputes.

Another service the agency could provide is in the area of procedural reform. In regulating, permitting, or adjudicating areas, procedural innovations can be created that formally establish a mediation step as a routine matter. Current laws and regulations may implicitly provide for mediation, but do not do so explicitly. Systemic reform in these areas is an important activity in which an agency of this kind might engage, and which might be helpful to disputing parties and other agencies.

Finally, since the agency will rely heavily on private practitioners for actual mediation, it might be able to develop funding to provide financial assistance in instances in which parties want to use private mediators and cannot afford the total cost.

There is a theory that an agency like the Mediation Service will maximize or expand the available funding for mediation and its related activities. I am unsure of this proposition. It is now funded by a combination of foundation and state funds. I believe that the agency should be funded entirely by the state government, although actual mediations should in most instances be funded by the parties. But whether funding through this agency will ever be available for the practice of mediation or whether it will only provide for the administration of mediation services has not yet been determined.

The agency was created by the interest of one state cabinet secretary and the National Institute for Dispute Resolution. As a result, it does not yet have a constituency or base of support within the state administration from which to work. State agencies and other parties who might use the office need to participate actively in the formation of its policies and procedures. We are now forming a Board of Advisors which will play an important role in this respect.

Those are the ideas I have so far developed. I am interested in hearing comments on any point you found provocative.

(MODERATOR)

I think that was an interesting discourse from someone who has

established a state office. Some of the considerations Dave raised are the same kind of questions that we need to ask ourselves in Ohio. Now, Howard Bellman brings a slightly different perspective.

(HOWARD BELLMAN)

My comments contrast with, and perhaps add to, the comments made by David O'Connor. While ten minutes is a bit of a challenge to explain everything I have been doing for the last eight or nine years, advising an entire state seems like a wonderful opportunity. What I am going to do is to mention a few things that strike me as words of wisdom for your judgment.

One thing of which I am absolutely convinced is the efficacy of environmental mediation. Now while I define "environmental" issues very broadly, I define "mediation" very rigorously. Mediation requires parties who agree to sit down at a table, possessed with priorities, and bargain, propose and compromise. One cannot tell me that any process which resolves disputes is mediation just as one cannot paint something green and call it grass.

I also believe that environmental mediation is appropriate for Ohio. A few years ago I was trying to sell the idea of mediation to the Ohio EPA and received an apathetic response. However, I do believe that Ohio is ready for it.

It is important, however, to apply mediation selectively. Mediation is not here to replace anything on a global scale. Mediation is to be used when the parties want to use it and should not be forced on the parties. But this creates an uncertainty in the demand for mediation. Therefore, if an agency were created which served an uncertain demand, two risks are encountered. One, the agency may force a negative mediation experience on parties. Second, the agency may over-promise results. These risks defame the process.

The criticism leveled against over-promising is an enlightened criticism. The millenium will not occur if the mediation process is adopted. Mediation will not result in the elimination of power and political advantage. These results should not be promised. Mediation should be offered as an alternative to other dispute resolution procedures, but one that has its own limitations.

Creating an agency with an uncertain demand also pressures the agency to redefine results in order to present an annual report which shows how much work was done for the budget allocated. It does not matter if the agency's funding comes from a founda-

tion or legislation because it must still report. Reporting requires counting settlement cases. This results in redefining what is a settlement and what is a case. For instance, someone will call 400 people on the phone, and then will say 400 people were contacted. These contacts become 400 cases. Then, by dividing the budget by the 400 cases, the agency indicates how inexpensive a process this is per case. However, the original phone contacts may or may not have led to good resolutions or any resolutions. In sum, one must be careful in defining the mediation process.

What I propose to this state is to stage the whole process in terms of Ohio's interests and in the interests of public policy. I would suggest that government leaders forcefully encourage their agencies to engage in meaningful mediation. The agencies should publicize that they are encouraging mediation and individuals should know they get points from leaders for resolving conflicts in this way. The state might try to marshal a combination of state and private funding for the support of this type of mediation. Then a separate agency might be created if and when a sufficient case load develops.

The funding should not reside with an agency, such as the EPA, that is a party to the conflicts. The money should be placed in the Department of Administration or the Governor's Office; an office in which the substantive responsibilities are subordinate to the staff level responsibilities. It is also important to keep the appropriate data over a sufficient period of time to become familiar with the types of cases introduced into the process and the resolutions of these cases that have resulted. The state should also train people, as a matter of policy, to be negotiators. There are sufficient mediators, but people need to be trained as negotiators to know when mediators are needed.

I also suggest separating environmental mediation from court diversion processes that attempt to relieve the burden on court dockets. Mediation is not a court diversion process; it is a dispute resolution process which attempts to resolve parties' disputes and not relieve a court docket. Also, court diversion programs require a high volume of cases to be successful. As I have indicated, a high number of "cases" does not indicate a mediation program's success. Success in a mediation program means that the terms upon which a conflict is resolved are superior to the terms upon which the conflict would have been resolved by orthodox processes.

Also, do not locate mediators in the state offices in which the cases will be handled. In such a situation, effective neutral mediation will not occur because a party to the dispute will be supply-

ing the mediator. The mediator should be procured from a source outside state agencies. The bottom line is that the mediator must be someone whom the parties want to mediate their dispute. This person is then anointed with effectiveness by the self-fulfilling prophesies of the parties. While a mediator may be selected by the parties because of the mediator's experience, it may also be simply the mediator's personal effectiveness that is attractive to the parties.

Finally, let me conclude with the thought that an Ohio process of mediation may not be necessary. At least consider why Ohio requires its own process. Why cannot Ohio use mediators and processes from other states?

However, one factor in Ohio which may spur a distinct mediation practice is its urbanization. While those from the East may not see it as such, those from the West recognize that mediation requires an "urban insight" available in Ohio. This factor may lead to the development of a distinct mediation practice in Ohio.

(MODERATOR)

Thank you Howard for some very interesting challenges and insights. Next, Rich Collins. Rich is the Director of the Institute for Environmental Negotiation in Virginia.

(RICHARD COLLINS)

Mark Twain once said, "If I ever saw anyone coming down the street that looked like he wanted to do me a favor, I'd turn around and run the other way." I was in that role as a mediator: I could do you a favor and help you find a solution. I could see a problem and attempt to help. But people were skeptical; and, sometimes, so was I.

Howard reminds me why we are named the Institute for Environmental *Negotiation,* and although I now reluctantly accept the term mediator, I do not accept the definition. I even toyed with the idea that the word mediation not be used because I was not sure of what it meant or if it would be useful in Virginia.

I believe that mediation is not the entry of a skilled, neutral third party into an institutionalized conflict which is deadlocked. It is the creative generation of a setting and the exploration of mutual interests to the point at which those interests can become part of a mutually acceptable agreement. Mediation occurs despite

organized Bar opposition, scientific skepticism, bureaucratic conservatism, corporate calculation, political protectionism and environmental paranoia. The process succeeds because problems need to be resolved.

The Institute exists in large part because the Foundation felt that the idea of having something like mediation available in Virginia was worth exploring. It was willing to put enough money on the line to allow me, a professor in an academic department, to speak with the President of the University and tell him why this organization deserved a chance. Mediation is a public service that is likely to be valuable. Mediation will not only help train graduate students, but also will bring in support money for activities that are directly germane to those who are involved in environmental planning and policy analysis. Moreover, it is something that can be consistently integrated with academic research and service functions. The President was persuaded to give the program a try, and I went to the Foundation to request funding for three years.

I was skeptical then and I still remain skeptical and somewhat surprised about the success of this organization. The individuals involved were never formally trained in mediation; none knew whether they ever wanted to train others. But we were fairly familiar with the variety of today's substantive environmental issues. We knew about bureaucracies and analysis. We were familiar with litigation problems and the statutory basis for land use and environmental regulations. So, in a sense, we were not without some understanding of possible issues. But we became mediators by a process of meeting, arguing, holding staff meetings and asking a lot of questions. For instance, what are the ethical limits of a mediator? How are the power implications worked out? Also, we invited people whom we thought knew more than we did to talk with us. We learned a great deal from them even though, in many cases, we rejected what we knew was good advice.

But most of us were not interested in being part of the movement to support alternative dispute resolution. In fact, I think that mediation is a useful process, but is dominated by lawyers and is too litigation-oriented. Environmental problems require policy intervention as well as a concern for the use of scientific data and bureaucratic turf problems. It is not like the classic labor mediation experience, which is heavily influenced by attorneys.

The goal of environmental mediation is dependent upon the development of a sense of mutual interest between the various parties and some hypothetical outcome that will be in the public in-

terest. Parties need to get to know each other before determining how substantial their disagreement is. They ought to know how each perceives the situation before they go ahead. But the situation is influenced by regulations which govern their relationship. Therefore, we asked ourselves if there was any role for us in the governmental regulation development.

We asked: What kind of regulations does the state have? Does the state apply the same regulation statewide? Whom does the state bring into the regulation-creating process? Can we structure a negotiation for regulation promulgation? The answer seemed to be yes, we can. For instance, if a bottle bill were proposed, we would bring together the bill's opponents and proponents, using data on employment effects, recovery systems, etc. to permit intelligent discussion.

Surprisingly, we encountered a number of difficulties even though we were offering mediation cost-free. We had Foundation grants and were not on anyone's payroll. We mediated as a public service and informed clients that we had no financial needs. Therefore, there was no self-interest or motivation to succeed at all costs, although I sometimes felt like an engineer who wanted to do a job satisfactorily.

We have, however, recently changed our original method of funding and now charge for our services. For example, we had a $90,000 contract with the state legislature to do a technical mediation on how uranium mining might affect the health of Virginians. We also had a number of urban design projects in the $10,000 category.

I believe that what we have been able to accomplish is due in part to the fact that the Institute has expanded experimentally in terms of concept and definition.

I also think that our "success" is based on the fact that we did not go all over the country. We were not trying to establish a reputation. We were not developing written theory. We were dedicated within the confines of Virginia to see if mediation could work. When our experience showed that in many cases it could be valuable, news of our success traveled by word of mouth to environmental groups, corporations, and, most importantly, to government agencies in which agency officials began to speak highly of the process.

To conclude, I would like to quote from a speech given in the Province of Ontario which reflects a view different from ours:

> While we remain vigilant in protection of Ontario's birthright, the environment, we are prepared to reform from experience the processes in our regulatory framework. For instance, in some cases, mediation may be more a sensible means of resolving disputes than existing administrative

or judicial processes. Consequently, experimental mediation procedures will be initiated within the Environment Assessment Board.

In other words, there exists in Ontario a policy direction that involves mediation. We acknowledge it. But I suggest it should be implemented experimentally. And then, as Mao Tse Tung in another context once spoke, "let many flowers bloom."

(MODERATOR)

Thank you very much. I think we have heard some consistent and diverse views. At this point Keith Hawkins is going to share with us his perspective on his experience in England.

(KEITH HAWKINS)*

I. INTRODUCTION

I will present a short descriptive analysis of aspects of the enforcement of water pollution control regulations in England and Wales. The presentation, drawn from a much larger study,[1] is intended to suggest how various forms of informal dispute resolution processes may actually be embodied in the routine enforcement of rules and regulations covering a wide area of behavior of concern to the law.

In the enforcement of water pollution control laws in England and Wales, disputes are most likely to occur in the process of setting legally enforceable standards which determine what is or is not a polluting effluent. At the enforcement stage, the dispute arises when a field inspector, faced with what seems to be a polluting discharge, is required to take remedial action against the polluter. It is this latter stage which I shall address.

II. THE FORMAL ENFORCEMENT PROCEDURES OF POLLUTION CONTROL STANDARDS.

The broad legal structure and formal organization of water pollution control in England and Wales closely resembles the design of similar regulatory institutions in America.[2] In essence, the

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*(Prof. Hawkins redrafted his presentation into article form. Footnotes for his presentation are located at the end of the Symposium. EDS.)

1. K. HAWKINS, ENVIRONMENT AND ENFORCEMENT—REGULATION AND THE SOCIAL DEFINITION OF POLLUTION (1984). Many of the ideas presented in this paper are drawn from the book.

2. *See id.*, chapter 1, for a more detailed account of legal and administrative provisions and practices.

legislature defines the existence of a problem, creates an enforcement bureaucracy to do something about the problem, and grants it high levels of discretion to determine and enforce policy. In providing for the implementation of policy, the legislature equips the regulatory bureaucracy with the power to invoke the criminal law, thereby in some sense aligning the secular behavior of polluters (behavior with technical, technological, and economic implications) with more familiar forms of criminal behavior (prototypically harms to person or property) addressed by the code of traditional criminal law. However, one contrast with American regulatory practice is that English regulatory agencies tend to be equipped with fewer formal means of control. There is no array of intermediate formal measures—consent decrees, cease and desist orders, civil fines—which may precede or foreclose criminal proceedings in the United States. In England the enforcement process is much simpler and is organized ultimately around a binary choice for the enforcement agent. Essentially the issue for an inspector faced with a pollution is whether to prosecute. Note, however, that it is possible for a regulatory agency to seek an injunction to restrain polluters from undesirable activity, but this measure had never been employed by the authorities with whom I worked.[3]

Although the criminal law is provided as the ultimate sanction for violating the administratively determined pollution control standards, it is in fact very rarely used. Each of the ten water authorities in England and Wales prosecutes only a handful of cases each year. Indeed, one of the two agencies which were the subjects of my research prided itself on being the toughest water authority in the country, yet in two consecutive years in the late 1970s it sought only twenty-one and eight prosecutions, respectively.[4] The other authority researched prosecuted about three cases a year. Nevertheless, the enforcement agents (the corps of inspectors employed by each authority to monitor and control pollution) still conceive of their job as primarily one of enforcing the law. While it seems odd that this view can be held in the face of such data, the matter is dependent upon the essential conception of law enforcement to which regulatory agents subscribe. In pollution control work the dominant conception of law enforcement is one of attaining the ends of the legislation by whatever means appropriate. In the tradi-

3. Threatening an injunction is a different matter, however, and is occasionally employed in the informal processes of enforcement. *Id.* at 152.
4. *Id.* at 177.

tional arena of criminal law, enforced by a uniformed and public police, the conception of enforcement is one of punishing the breach of a rule.

III. THE PERSPECTIVES OF THE STANDARD ENFORCER AND POLLUTER

A. *The Polluter's Perspective*

In this context by far the commonest setting for the existence or potential for disputes arises at the stage at which an enforcement agent seeks to implement the water pollution control standards. After all, the essence of regulatory enforcement, so far as inspectors are concerned, is to get the subjects of regulation to do what they do not want to do. Many industrialists and farmers tend to regard pollution control regulations as an unnecessary and costly burden upon their productive processes, a burden the impact of which will be reflected in higher prices or lower profits. The dispute in this arena of legal control arises from the fact that people are being compelled by the criminal law to do what they do not want to do either because they regard complying with social or economic regulation as too costly, or because they regard such compliance as unnecessary. For example, farmers believe they do not need to change their time-honored practices by the dictates of an official from a regulatory agency since they have been behaving in certain ways for years in disposing of waste. Some farmers and industrialists also tend not to accord legitimacy to a law that burdens productive behavior which benefits the community in general. The cost is not seen in narrow commerical terms, but as a more general cost to the community, since goods become more expensive at home and less competitive in the international marketplace. When in principle the subjects of regulation accept the need for some restraint, they may have a different conception of the kind or degree of restraint which is required. These contrasting perspectives are often crystallized and made real when a field inspector tries to improve the quality of a polluting effluent or seeks to install preventive works in order to forestall an accidental discharge.

B. *The Field Inspector's Perspective*

The field inspector, however, is interested in clean water. The regulatory official works in an arena of social control in which compliance tends not to reside in refraining from an act, but in carrying out some positive action. Compliance costs the rule-breaker

money. Therefore, the social skills of reasonableness, patience, and persuasiveness are regarded among field staff as the supreme practical arts of the job because the exercise of these skills preempts disputes.

Although field inspectors utilizing these skills witness compliance with their requests, they believe polluters are, ironically, deviant. As one experienced officer put it, "Everyone tries it on, at least to begin with. Even the big firms who will do what we want eventually. They will all say 'It wasn't us', or 'It was an accident.'"[5] When I asked him how often polluters tried some form of deception, the officer replied:

> Very regularly, very regularly. Nearly everyone to more or less a degree will try to kid you about something. Either the nature of the cause of the pollution, or how long it's been going on, or they 'weren't aware that there was a pipe there,' or 'Is it really? I've never been down and looked at that watercourse for the last 20 years, I didn't realize we were causing a problem.' But nearly everyone tries some minor deception. . . They will all have a go. . . even the biggest companies where you're going to get the perfect response, but they will still try to kid you that they 'weren't aware that this was happening,' or 'it was while they were on leave' or, y'know, they 'weren't doing it at all.'[6]

Note that this ritual "game" is played by "the biggest companies where you're going to get the perfect response."[7] With certain kinds of polluters, however, the game is played in earnest and at greater length.

IV. ENFORCEMENT STRATEGY: INFLUENCES ON THE FIELD INSPECTOR'S APPROACH

The broad characteristic of this game when played by the pollution control agent is enforcement of law by a strategy of compliance. The precise nature of the enforcement process depends on the kind of rule-breaking encountered and the kind of rule-breaker with whom the agent must deal.

A. *Characterization of the Standard Violation*

Standard violation characterization is determined by what kind of pollution the inspector must handle: implications differ depending on whether the inspectors are confronted with a "one-off" pollution as contrasted with a "persistent failure to comply." The former is a term used to cover pollutions which are over and done with—

5. *Id.* at 118.
6. *Id.*
7. *Id.*

a sudden discharge or a spillage, for example—while the latter refers to pollutions which run episodically or continuously.

A one-off is a much more serious matter because it suggests the possibility of a deliberate act; the sudden discharge may have been the result of toxic liquid being spilt by accident in the factory yard, or being flushed down the nearest drain to avoid paying several hundred pounds to have it removed to a licensed disposal site.

The commonsense assumption with persistent failures to comply, on the other hand, is that there is no serious intent to conceal since the effluent is discharged regularly or continuously. Therefore, cause will be important in characterizing the type of rule-breaking which has occurred, for cause embodies the crucial difference between an "accident" and a "deliberate act" and the intermediate possibilities of various forms of indifference, carelessness, or negligence.

B. *Initial Characterization of the Polluter*

Suggestions about the type of rule-breaking are also reflexively connected with characterizations of the polluter, assuming that the polluter can be detected.[8] The cause of a pollution will tell an inspector something about the kind of person with whom he is dealing. Equally, the kind of polluter encountered can provide ideas about causation.

Polluters tend to be characterized in terms of polar opposites. Thus, a polluter will be regarded as either "co-operative" or "bolshie." These characterizations are derived from the perceived responses of the polluter to the pollution and the field officer's efforts at law enforcement, and form what is known of the polluter's past relationships with the agency.

1. *Polluter's Occupation*

The picture which takes shape will often be embellished with an inspector's views about the polluter's occupation. Certain oc-

8. Note that pollution, like many other forms of deviance, may be socially organized to prevent or impede its discovery, thereby vastly decreasing the likelihood that an offender will be detected. In addition, all water pollutions are ephemeral forms of rule-breaking in the sense that evidence of their existence dissipates with time, dilution, and the natural purifying capacities of water courses. The quality of evanescence is more marked with a one-off water pollution since it is increasingly severed from its point of origin as the polluting slug drifts downstream. *See* Hawkins, *Creating Cases in a Regulatory Agency*, 12 URB. LIFE 371 (1984).

cupations or industries are regarded as particularly suspect and disreputable. One suspect category is the industry in which the costs of compliance give companies much greater incentive to ignore or evade pollution control regulations. One such industry is metal plating, for its pollution control costs are a very significant part of total manufacturing costs. People in other kinds of occupations are considered more likely to impugn the legitimacy of the officer and the pollution control agency; farmers and 'fly-by-night' industrialists who are 'here today, gone tomorrow' are typical examples of those who symbolically reject the agency's authority by egregious noncompliance.

C. *Temporal Aspect of the Pollution Encountered*

The enforcement strategy adopted is not only influenced by the character of the standard violation and polluter, but is also dependent upon the temporal aspect of the pollution encountered. Some pollutions can be stopped when the enforcement agent arrives on the scene, but other types occur over a period of time. Time, work and money are necessary to cure this type of pollution because the cure will almost always consist of the installation of new or improved pollution control equipment, or the physical redesign of existing treatment or manufacturing processes. Enforcement agents recognize that such work cannot be attempted with immediate effect. But, once a measure of compliance has been attained, it must be continuously maintained by the inspector by means of routine monitoring—inspection and sampling on a regular basis—and in this sense compliance has a quality of endlessness.

D. *Signs of Compliance with Enforcement Strategy*

However, to talk in these terms is to conceive of compliance as a state. It is more helpful to view compliance as a process, since in the enforcement of pollution control regulations certain *signs* of compliance have a central importance. These signs may consist of some physical changes in treatment capabilities or improvements in the quality of the effluent. But of particular importance are the perceived intentions of the polluter. Thus, a polluter may be regarded as "compliant," even though dirty water continues to be discharged, because the polluter is able to persuade the inspector that its intention to comply is honorable. This dual impression of a polluter who is compliant in spirit if not in action may continue for a substantial period of time. Indeed, it may take months or years of patient bargaining to get the polluter to do what

the field officer ultimately wants.

1. *Attitude of Polluter*

The response of the rule-breaker to the enforcement process is treated as a matter of considerable significance. One of the important signs of compliance which is central to the evaluation of the rule-breaker's response is the polluter's "attitude." Attitude is as important as actions taken by the polluter:

> I think that's the most important thing, is his attitude. Because the pollutions themselves can be so variable. . . If he's trying to solve it, I go along with him. If he's not interested in it and thinks 'Well, it will go away in time anyway' then obviously I'm going to press him harder then. Yeah, it is *the* most single important parameter I think, his attitude.[9]

The continuing attitude of the polluter suggests the degree to which pollution control work is being taken seriously, if at all, and indicates to what extent the field officer is being reasonable in his demands and legitimate in his expectations.

E. *Reasonableness of Field Inspector*

The enforcement strategy adopted will also be characterized by the officer's concern with being "reasonable." Reasonableness is a major occupational imperative of the pollution control officer, stipulating a need to be neither too strict in the demands made of the polluter nor too impatient with the polluter's progress. To be too hard, unreasonable or impatient with the polluter risks delay, evasiveness and continued noncompliance.

F. *Deterrence Possibilities*

Should being reasonable prove ineffective, however, pollution control inspectors may turn to an alternative approach. Another dimension in the process of settling differences is deterrence. Inspectors assume that polluters may be amenable to threats in the course of the enforcement relationship. This deterrence resides not in the penalty which may ultimately be announced by a court upon a successful prosecution, but in the ramifications of being associated with the formal process of prosecution and trial.

Pollution control officers believe that companies do have certain incentives to avoid the taint of being involved in the formal processes of the law. They may be commercial incentives such as the

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9. HAWKINS, *supra* note 1, at 109.

desire to protect the reputation of the firm. Another less apparent, but nevertheless weighty incentive, is the desire of companies to maintain good relationships with other regulatory agencies which may have important benefits to confer. And, of course, it is also important for individuals in companies to protect their own positions against sanctions from within the company following a pollution for which they are held personally responsible.

V. ENFORCEMENT STRATEGY: BARGAINING AS THE CENTRAL CHARACTERISTIC

In all cases the central characteristic of the enforcement process is settling differences by bargaining. Enforcement agents bargain because it implies a degree of consensus from the other side. In arriving at a bargain, the polluter offers goodwill, cooperation and ultimate compliance, while the enforcement agent offers free information and advice on pollution control techniques and, most importantly, forbearance. The enforcement agent forbears from enforcing the law to the extent theoretically possible. Indeed, bargaining is possible because the law need not be formally enforced:

> instead of leaving the impression that you're some jump-up little upstart from an office using the law to tell him what he must do, if you talk to him right, you finish up leaving him with the view that 'Well, he's a damn good chap . . . I could've been prosecuted for this. I'm breaking the law, but he's obviously going to shoot it under the carpet and let me get away with it.' So . . . he does what he has to do, with goodwill, and everybody's happy.[10]

A. *The Process of Bargaining*

Given the ritual moves in the game which are routinely expected by enforcement officials, this process of enforcing the law by settling differences is not usually achieved immediately. Instead, arriving at an acceptable solution takes time and possibly several visits from the field officer. In order to get the pollutor to do what the officer would like to be done, an array of negotiating tactics will be employed serially, depending on the polluter's response and the seriousness of the problem. These tactics develop from lenient, patient moves to more drastic measures. This approach, which seems characteristic of much regulatory enforcement was well described by Rock in a study of debt enforcement as the application of increments of increasing unpleasantness.[11]

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10. *Id.* at 123.
11. P. ROCK, MAKING PEOPLE PAY 65 (1973).

In some cases the process may be compressed and the number of steps employed will be reduced. For instance, a serious pollution may be handled straightaway with the drama of taking a legal sample, which serves as the formal collection of incriminating evidence admissible in a prosecution in court.

1. *Steps Taken by the Standard Enforcer*

Such cases are relatively rare, however, and the typical approach begins with the enforcement agent informally requesting certain action to be taken by the Polluter. This request may be reinforced by a formal letter sent from headquarters and, if necessary, the involvement of the officer's immediate superior. If these moves do not produce any sign of the desired response, the officer will engage in firmer action. Instead of requests, demands will be made; warnings or threats may be issued; finally, a legal sample may be drawn, a move which is both practical and symbolic, for it is intended to underline the gravity of the polluter's position as well as to collect evidence. A formal sample may be followed by issuance of a Notice of Intention to Commence Proceedings, which is the final step before prosecution. Throughout this process formal legal proceedings are presented as the ultimate and logical consequence for the continued noncompliance of the polluter.

Efforts at resolving the problem will be pursued by the enforcement agent throughout this process, even as the dispute deepens and more weighty enforcement moves are made. These moves must be carefully handled by the officer to avoid prolonging or exacerbating the dispute. For example, the polluter who remains flatly obstinate may discover that the field officer's powers are not quite as severe or as readily used as might have been suggested. This situation creates for the officer a problem of preserving his credibility as an enforcement agent. However, the enforcement agent must depict the coming of the formal legal process as inexorable and an unpleasant fate to be avoided at all costs.

In the course of seeking to resolve their differences, both parties often engage in a continual redrawing of the lines. The pollution control officer will adjust his tactics in light of his interpretation of the discharger's behavior and degree of compliance, while the polluter will adapt to the changing demands being placed on him by the officer. The nature and shape of this form of disputing process are molded by such reciprocal interpretations.

VI. LAST RESORT: PROSECUTION AS A SELECTIVE PROCESS OF STANDARD ENFORCEMENT

A. *Why Few Pollutions are Prosecuted*

Few disputes are crystallized in the form of prosecution for several reasons. First, in this branch of regulatory enforcement, prosecution is treated as a public act, a means by which a regulatory agency can dramatize that it is doing something for the public. Yet there is also a notable political dimension in regulation. Agencies find themselves continually caught between their competing publics. "Business" or "laissez-faire" constituencies regard regulatory control as an unnecessary burden to be either eliminated or reduced. However, "activist" or "pro-regulation" constituencies want to see regulatory law toughened and more strictly enforced by agencies. This fundamental conflict of view is handled by agencies by displaying action to placate their activist publics by showing that they are doing something, *but not too much* so as to arouse the hostility of their business public. As a senior official said, "the big risk on publicity [of prosecutions] is that [regulatory agencies] will be castigated in the press as the big heartless bureaucracy victimizing the private citizen."[12]

Second, most pollutions are too insignificant to be worth dramatizing by prosecution. Also, the business constituency is likely to be outraged at the use of public resources in trivial cases. One working rule for regulatory agencies contemplating prosecution is to avoid prosecuting minor cases.

Third, agencies and polluters have a mutual interest in the successful resolution of differences between them which avoids formally enforcing the law. Moral and technical impediments to using the formal machinery of prosecution to secure compliance create a working presumption against the formal use of law, replacing it with an imperative to handle matters informally.

B. *Which Pollutions will be Prosecuted?*

These influences all conspire to produce a very sparing use of formal proceedings. To use prosecution more frequently would violate the injunction to be reasonable. But what determines which cases are selected for prosecution? Pressure exerted to display the credibility of the regulatory agency as a legal enforcement authority

12. HAWKINS, *supra* note 1, at 205-06.

by prosecuting some cases, however few, results in an interest in prosecuting the egregious and persistent failure to comply for deterrent purposes. Prosecution not only shows that the agency means business, but also symbolizes disapproval of willful persistence in noncompliance. Also important is the occasional use of prosecution to mark newsworthy cases or cases which otherwise cause grave harm. This enforcement also displays the enforcement activity of the agency. These are the "big" cases which may occasionally take advantage of the framing of the law in strict liability terms.

Much more frequently encountered, however, are blameworthy cases which are morally disreputable either because of the persistence of the law-breaking, or its maliciousness or calculation. In such a case the organizational rule is to prosecute because the offender *deserves* prosecution. Ambivalence toward prosecution is absent because what is being sanctioned is the deliberate, negligent, or persistent behavior, and not the pollution itself. In behaving in this way, agencies are employing a framework recognizable to both its publics. The activist public will expect action as a matter of course, but in sanctioning misconduct recognizable to the laissez-faire public an agency is avoiding the complaint of vindictiveness. It is prosecuting, and thereby punishing, the "bad" case. In an environment of ambivalence, what is mutually recognizable is of immense significance.

VII. CONCLUSION

Thus, in the enforcement of water pollution control laws, disputes arise and are foreclosed or resolved by the enforcement agent's practical arts of reasonableness and patience. Should the polluter fail to live up to his side of the implied bargain, however, pressure will gradually be applied to persuade or coerce him to something which can pass as compliance. The extent to which demands will be made and pushed through will depend upon the officer's sense of the polluter's willingness and ability to comply. In other words, justice is accomplished in compliance strategy in the process of negotiation. In contrast, justice is accomplished when someone is let off when law is enforced by the police.[13]

In pollution control work, the failure to negotiate a resolution by enforcement agent and polluter is signaled by resort to formal

13. *See* RIESS AND BORDUS, *Environment and Organization: A Perspective on the Police*, in THE POLICE: SIX SOCIOLOGICAL ESSAYS (D. Bordua ed. 1967).

proceedings. Reluctance to prosecute is inherent in the enforcement moves preceding prosecution as a result of pragmatic concerns about getting the job done in the best and most efficient way, and moral concerns about what it is right and proper to do. The pressure does not come from lack of resources to prosecute (one of the agencies researched made an annual profit of twenty-seven million pounds in the second year of the fieldwork), nor from the pressure of cases with which to be dealt. That prosecution is a very rare event suggests the degree to which field level enforcement agents are able to resolve disputes in their everyday work.

(MODERATOR)

Thank you very much. I think it is an interesting reminder that already there is a good deal of dispute resolution in the environmental field in the areas of enforcement, standard setting and development of legislation. At this point, I ask Jenny Aveny to respond with some of her comments and thoughts about what, if anything, should be done in Ohio.

(VIRGINIA AVENY)

The Ohio EPA is beginning to stage dispute resolution. The agency has requested a budget allocation of $50,000 for the 1986-1987 fiscal year to begin promoting dispute resolution outside of the regulatory framework of the agency. An opportunity exists to introduce people who are in the environmental protection area to independent mediation on those issues that cannot be resolved in the regulatory program.

A major issue is the capacity to deal with the unbalanced power level of the disputants. The power levels need to be balanced before adequate dispute resolution or mediation can be implemented. Some communities may not receive benefits from mediation equal to the negative environmental impact that they incur. In areas where waste materials are stored, treated or disposed, the issue exists of whether the community is getting any benefit from mediation. The EPA, of course, does not have the capability of dealing with that kind of issue. So the EPA is trying to identify to where it can refer people for mediation, and how it can develop a framework for establishing that the mediators are neutral persons.

The agency's role, however, does not involve developing dispute resolution, although the agency does engage in the same kinds of negotiations as those described by Keith Hawkins. For instance,

the agency engages in steps such as requests for compliance, initiation of a compliance schedule, and filing litigation.

Standard setting is very important in the agency; it must be the highest attainable or the job is not being done. Mediation may impinge on standard setting at the compliance or settlement stage by trading present results for future standard integrity. For example, a toxic dispute in which the risks are not known may result in mediation achieving an outcome that is later unacceptable under adopted standards.

Pete Clapham from the Hazardous Wastes Facility Board has been working with the agency to help identify those points in the siting of hazardous waste facilities that may best lend themselves to mediation. David Hartley may want to talk more about how the new legislation will bring people into the siting process.

(DAVID HARTLEY)

I have a problem believing that people are going to negotiate when they have a reason to negotiate. The people that believe in NIMBY (not in my back yard) are generally the people who are involved in the major cases. They are not willing to negotiate.

The area in which I have worked is negotiating legislation such as the Hazardous Waste bill and the regulation of salt brine. Now I am negotiating a ground water bill. I will not use the term mediation or negotiations, but for the Hazardous Waste bill a carrot and stick approach was used to get the interested parties to sit down at the table. The Chamber of Commerce needed better procedures in the hazardous waste area. They also needed me to avoid harassing them by trying to sneak bills wherever I could or put bills into other bills. So the Chamber of Commerce agreed to negotiate with the Sierra Club, Environmental Council, and the Audubon Society. Eventually we agreed on 85% of the bill. For two months nothing moved, and progress did not seem likely. I was frustrated, and so I chose a person to act as mediator. I asked the Sierra Club, the Ohio Manufacturer's Association, the Audubon Society and all the people involved whether they would be willing to accept the mediator I had chosen. Then I contacted the mediator and asked him to mediate the remaining 15% of the bill, which he did successfully. We came up with a bill with which not everybody was happy or unhappy. The bill was acceptable because the parties were willing to negotiate.

Presently, I am working on a ground water bill. And we are sitting down about once a month with as many parties as possible to

negotiate a bill. I think we are making progress. But this is a different area from what the other speakers have discussed. I think more success can be achieved in bill negotiation than in individual dispute resolution.

(PETER PROCARIO)

My background is as an attorney and environmentalist. I spent several years as an attorney for the EPA. I have represented a number of individuals in front of the EPA. I have taken a number of environmental cases to court: litigated some, settled some, negotiated some, possibly even mediated some. And I have represented citizen groups and small industries before the EPA. So I tend to think that I have seen all sides of what happens in environmental disputes as they arise in front of the EPA.

I am concerned about mediation. I think that to a certain extent mediation, like motherhood, is easy to espouse but difficult to define on a case-by-case basis. I think this is the main concern I have with the process in Ohio. I am not opposed to mediation. In fact, I consider myself to be a firm believer in mediation. But I am not sure what mediation is. Nor am I certain of its usefulness in Ohio.

Ohio is an adversarial state regarding environmental issues. The entire process of permit issuance, enforcement actions, and citizen actions are predicated on an adversary system. Someone brings a problem to the attention of a party or an agency. That party or agency is asked to resolve the problem. Some of those issues lend themselves very well to mediation and negotiation. Many of them do not.

I think another unfortunate part of the Ohio system is that a great number of property rights rest upon environmental regulation. As a general rule, I think those issues have been the most difficult to negotiate because they do not easily lend themselves to mediation. It is very difficult to mediate property rights.

Another problem is the difficulty of identifying who the parties are in a given case. In any mediated or negotiated situation in which I have been involved, the successfully settled disputes have been disputes in which the parties are easily identified. However, I believe that all parties to or interests in a mediation are not represented by the parties that are present. As a general rule: when an issue arises the people or the interests that attend the hearing are those that are either funded or have been able to organize. I never presume that the groups in attendance represent all of the public interests.

I have difficulty defining mediation. Depending on how mediation is defined, I am either totally in favor of it or totally opposed to it. I am limiting my comments to the mediation of environmental issues in Ohio under the present circumstances. I believe that mediation is a valuable and useful resolution technique for many disputes. But it certainly is not going to solve all environmental problems. Some of the examples we have discussed are issues that lend themselves to mediation. But such issues as where to locate a landfill are not amenable to mediation.

Finally, I think that mandated mediation in the current Ohio setting is a questionable dispute resolution technique. The only successful mediation is mediation that is voluntarily entered into by the interested parties. So, if Ohio law were amended to allow or require mediation within forty days of X event, another legal step in the process will have been created that will never be rid of lawyers. I think that this type of mandated mediation, or forced mediation, is not mediation. I am not opposed to mediation because mediation is inevitable and appropriate in certain situations. For instance, I participated in a case that, at least on an ad hoc basis, created a mediation by its own terms without having an outside mediator. But that kind of situation is rare.

I am a firm believer in mediation, but I have qualms about its operation. Before jumping on the environmental mediation bandwagon in the current Ohio context there must be an examination of the whole license and permit granting structure in the state of Ohio.

QUESTION AND ANSWER SESSION OF ENVIRONMENTAL SYMPOSIUM

(UNIDENTIFIED SPEAKER)

I would like to say one thing. I think that Peter's comments on the ambiguity of the meaning and applicability of mediation are important. I think that mediation should not be viewed as an alternative to the law or applicable enforcement procedures. It should be employed in conjunction with the statutory responsibilities of an agency required to make policy and final decisions. This is what I term mediation in the classical sense. But when mediation alone is the basis for the agency's policies and regulations, mediation becomes consultative and involves the public in a different way

then does classic mediation. This is not mediation in the classical sense.

(VIRGINIA AVENY)

I would like to respond. The approach the agency is taking is not to consider mediation its role. The agency does take advantage of and is trying to expand its opportunities to employ dispute resolution in the permit granting process. For example, the agency encourages citizens to provide input regarding appropriate terms and conditions of a permit. This input may help set standards.

But the requirement of timeliness in the enforcement procedure does not lend itself to this type of mediation. The agency may issue three or four letters based on field investigations that have uncovered violations before it is ready to initiate an enforcement action. The predictability, consistency and timeliness of this procedure are characteristics the agency is attempting to improve because they are the foundations of a solid regulatory program. To allow delays at certain stages by mediating an issue may result in a negative impact on a predictable regulatory program.

However, the agency is still looking to the dispute resolution process to handle issues that are outside the regulatory framework. For instance, mediation may be beneficial when a facility has a poor reputation or when manufacturing processes exist that are alarming to people.

(HOWARD BELLMAN)

Let me comment on the reference to power leveling as a condition precedent to mediation. I think that was the phrase, power leveling, and I know what you mean because it is in every discussion on the subject. I will tell you that if you wait for power leveling you are waiting in a vacuum. Power leveling is a theoretical possibility that is useful in theoretical discussions. But society will not provide you with an equilibrium of power. I have spent my life as a mediator and have never seen an equilibrium of power. The lion's share will go to the lion when the mediation is finished. This is important to say to prevent mediation from over-promising results.

Promising the world through mediation is underscored by a general repugnance toward conflict. There is a sense that conflict is bad. I do not believe that, but certain people believe that conflict should be avoided whenever and wherever.

However, when you promise to limit, or anticipate and avoid, conflict, you become seductive because this approach appeals to people. You end up putting skilled people who could not be considered mediators into a community in which conflict is threatening. They manage to avoid the conflict by becoming involved in the problem at such an early stage that they bring about a resolution before those who would oppose it have an opportunity to organize. These "mediators" do in fact avoid conflict by getting the ostensibly interested parties at the table. The mediation looks benign. In reality, however, you avoid conflict by favoring those whose actions might generate opposition.

For example, if someone wants to build a mine in downtown Columbus that person gets people to meet soon after the proposal for the mine, and thus avoid any opposition. Those who want to build the mine will be favored.

What I think is particularly perverse about this type of result is that the body politic is responsive to what is termed "economic development," and economic development can be promoted by conflict avoidance. Conflict will resist development. And so you can send people in early to subvert the possibility of organized conflict which might serve the community. That is why you must put a fine point on some of these mediation processes.

(MEMBER OF AUDIENCE)

What is the practical definition we need to adopt to avoid the potential "evil" or "wrong" in the premature settlement of an issue of potential conflict?

(HOWARD BELLMAN)

The practical definition lies in a passive role for the mediator. It lies in what I consider neutrality because an aggressive role for both the mediator and the process permits persuading people who are not ready for the process into engaging in the process.

The aggressive mediator says, "I know you are not organized yet, but why not get started? The other party might have something good to offer you." Of course, the mediator does not say that after you are organized the other party may have to offer you a hell of a lot more.

And so I think that we try to market this process because we believe in it. But when you chase specific ambulances there is a possibility of an overly-aggressive approach which is not neutral because it favors those who are ready to negotiate.

(MODERATOR)

It seems to me that the biggest hurdle in mediation is getting people to come to the table. People do not understand to what they are submitting. They have to understand the definition of mediation. Part of that definition is formulated before negotiations are entered: it is created in the ground rules that are established to determine how the parties are going to proceed in the negotiations. In some of the processes in which I have been involved the stage at which it was "go" or "no go" was in the ground rules. A lot of the battle is over once you get people to understand why they are negotiating and what is their job. So this is a very important consideration. Be honest in mediation so the parties can believe that they will not be coerced or co-opted.

(PETER PROCARIO)

I think it is very easy for mediation to become an example of the failure of government rather than an improvement of government, or at least something of which the government can be proud. By favoring mediation as an end to all disputes you have adopted a pro-development stance, or depending on the context, you have set the stage for promoting what you think you are merely facilitating or mediating.

I am also concerned that by negotiating before a dispute exists or before an issue exists for which sides can form and all interests develop, true voluntary mediation has not occurred because something was excluded that needed to be considered. So I think it is very easy for mediation to represent a failure of government to regulate and decide tough issues. It could be a convenient method by which regulatory agencies can put off deciding a controversial or difficult issue.

(UNIDENTIFIED SPEAKER)

I have no illusions about the fact that a mediator cannot mediate unless skilled adversaries are present. It is not adversarialism that we are trying to eliminate; rather, we are trying to make adversarialism more useful when two people want to swing at each other. But the term mediator irritates me. It means some person is making sure people do not become angry at each other. Call me something other than a mediator because I am not interested in trying to bring premature agreement on an issue. But when a law

states that environmental impact evaluations should be conducted in advance of a project, we are supposed to worry about what the long-term effects will be. And yet no one knows that the party interested in the project is coming down the street. In this situation which mediator is helping somebody: the person who says "Look out, it's coming," or the person who says "Wait until it's right in your front yard and then fight?" If you do not look ahead, you are going to end up with a deadlock which has no way out other than social conflict.

I am talking about mediation within the context of the law and not whether we can get two people together. I am involved in this type of process, and I do not think a mediator has to be a passive, bland, neutral, gray suit type. If that is what mediation must be, then it is clearly wrong.

(MEMBER OF AUDIENCE)

Ohio has an example of both mediation and negotiation in the procedures employed by the Ohio Water Commission. The basic agencies involved with issues concerning surface water, ground water, and related land were represented on this commission.

This commission was created in 1959 after Ohio experienced a drought in the mid-50's and began a regional water planning process. It was terminated in 1972.

The Commission gave recommendations on water policy. The Commission would conduct hearings around the state during which potential problems regarding water use were voiced. I am familiar with hearings held in Akron and Dayton. The Akron hearing concerned surface water allocation and the Dayton hearing, ground water allocation. The Commission's recommendations did not have the effect of law but were implemented because they were so well-respected. I think that is mediation and negotiation. If we consider something new to implement in Ohio we should look at this commission's history.

(UNIDENTIFED SPEAKER)

I hesitate to say the history of water development in Ohio involved mediation. The large part of the process up to 1972 was basically the kind of process that Keith discussed earlier, which involved negotiating, arm twisting and letter writing. I hesitate to call that "mediation."

This process characterized and represented the total inability

of the state to enforce regulations that benefited the environment. As a result of that failure EPA-type legislation, the NPDS permit system, and air regulatory systems were introduced. These pieces of legislation were in reaction to the failure of informal negotiated enforcement. The regulations prior to this legislation were not stringent and the enforcement and compliance schedules were negotiable. For instance, engineers would talk to Republic Steel in Cleveland and would work out a seven year program. When the program did not work it would be extended an additional two years. So part of Ohio's environmental regulatory laws is a result of the failure of the informal system mentioned.

(UNIDENTIFIED SPEAKER)

The process in which the Ohio Water Commission engaged seems to be a public hearing process. People testified and their testimony seemed to be influential. I think that summarizes what you were saying. A formal record was kept and you can see some correlation between what went in and what came out. But there were many influences on the Commission which shaped its final recommendations.

(MEMBER OF AUDIENCE)

It seems that Ohio should not become involved in mediation at this point because it would sell environmentalism down the drain. Negotiation and mediation do not work unless one side has the power or the ability to make the other side realize that mediation or negotiation is to their advantage.

Also, I do not know if it is even wise to contemplate environmental mediation unless you know which parties should be involved in the mediation.

(UNIDENTIFIED SPEAKER)

Let us look at environmental dispute resolution differently for a moment. Let us not use the phrase environmental mediation. Let us look at the ability to develop policy, rules and regulation, and the ability to enforce these rules in the area in which the environment is involved. Are not politics in the legislature and litigation in the courts forms of conflict resolution, part of a process of public discourse and regulation? All are part of a common societal process which tries to determine how environmental values and concerns can be established in society. I think that mediation is

a fragile, helpful, weak effort to resolve conflicts which arise in this process.

(RICHARD COLLINS)

I think it is appropriate that you are skeptical consumers of mediation. You must avoid being seduced. But I am concerned when you say that mediation at this point in time will sell environmentalism down the drain. The response to that concern is to consider whether negotiation would be useful in appropriate cases. For example, can a mediator clarify the issue in a particular case?

I would like to go back to the example of the Water Commission and the role of government officials in what is called mediation. I am concerned about broadening the term mediation to include a lot of things which are more appropriately called exercises of managerial skill. Mediation requires impartiality and neutrality. It assumes a process by which the decision is made on the basis of the mutual agreement of the interested parties, and not the intervention of a powerful third party like a government official. A third party could result in two against one. Therefore, a mediator must avoid engaging in behavior which suggests that he or she sympathizes with one side. Neutrality becomes difficult to maintain when more than two parties are involved in the mediation. The mediator must understand that the parties' relative power, influence, and persuasiveness are going to decide how the dispute will be resolved, and not what the mediator's personal views are.

In addition to a selective approach to the application of mediation to environmental disputes, let me point out something which is not so obvious. If you become involved in these disputes, even though you might be disappointed in the outcome, you become important because you *were* involved in them. And if you become important you become powerful. But you are being invited into a cycle which requires rationalizing less than acceptable outcomes. You rationalize to get where you must be. That is life in politics. You cannot live outside of politics and be influential in government. If you withdraw from this cycle of involvement and power because you feel you are not ready you will not play a role in shaping environmental policy. So an invitation has been extended to shape policy, but it requires justifying certain outcomes to disputes to which you were a party.

(PETER PROCARIO)

I would like to suggest an area of environmental dispute resolution in Ohio in which mediation may be useful. The law concerning hazardous waste site selection requires a series of public and adjudicatory hearings which must be conducted at certain points in time. This powerful regulatory process, specified by law, reasonably assures us that the environment will be no worse off than it would be in the absence of mediation. The law as written allows mediation to be conducted if the parties can organize themselves to so do.

A problem with the law specifying the siting process is that there is so little experience on what the law means. Having been involved with a siting proceeding, I read those deadlines to be stringent in requiring the identification of parties and the time period by which a party should have intervened.

This process points out the problem of identifying the proper parties which should be involved in mediation. The law provides for a number of different classes of people to intervene. It mandates certain categories of people to be parties to a proceeding. For instance, the law dictates that county commissioners are parties in certain cases. If a citizens group wants to intervene in the process or be part of the mediation, should it be allowed to mediate when theoretically it is represented by the county commissioners? Or assume that during the siting process the time period has run within which a group can intervene. Should it be allowed to participate in a negotiated, mediated situation? Legally, such groups are not parties anymore. How do they fit into the process?

If a party can win in this process by strict adherence to the law, then it will resist mediating any issue raised during the proceedings. On the other hand, if a party is going to lose on legal grounds, what issues can be mediated becomes a relevant part of the way the case is handled.

The issues that are negotiable are basically compensatory in nature. In this situation the EPA will have already decided that a hazardous waste site is appropriate. Therefore, a dispute has been created, but the only issue now open to negotiation is how to compensate those individuals surrounding the site.

(VIRGINIA AVENY)

That is not true. A chemical company's storage facility in Columbus was considered by a number of people to require more in-

spections. These people presented this issue in the public hearing process. These people were not part of the adjudicatory process.

(PETER PROCARIO)

I consider that type of issue presentation as compensatory in the sense that what is no longer negotiable is should that facility be there. I agree that the issue you mentioned is negotiable.

(RICHARD COLLINS)

Your examples indicate that the mediation process is not a way to stop something from happening. Those who desire no change should avoid the process. What mediation involves is the details of change, and not the fact of change. For example, the traditional role of mediation in labor disputes is a process generally favored by those who want changes in wages, hours and working conditions. I want more money. I am having a hard time getting it. Let's get a mediator in here. The process, therefore, favors change and to this extent it is a powerful tool.